No. 289.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

NATIONAL LABOR RELATIONS BOARD

v.

AVONDALE MILLS.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR AVONDALE MILLS.

FRANK A. CONSTANGY,
M. A. PROWELL,
FRED W. ELARBEE, JR.,
MILDRED McCLELLAND,
1404 Candler Building,
Atlanta 3, Georgia,
Attorneys for Respondent,
Avondale Mills.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 1-4477.

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STATEMENT OF THE CASE.

In order that the instant matter be viewed in proper perspective Respondent deems it necessary to briefly review the salient facts relating to the issue here.

As found by the Court below, Respondent operates nine textile mills in seven communities in Alabama. It employs approximately six thousand people. Its principal offices and two of its principal plants are located in Sylacauga (the two here involved, Eva Jane Mill and Catherine

Mill), three other large plants are located at Sycamore, Pell City, and Alexander City, Alabama, all within a radius of forty miles of Respondent's Sylacauga operations (R. I, 74).

The evidence moreover shows that beginning in October, 1954, the charging Union in the instant matter began to make what it characterized as "surveys" in and around Respondent's Sylacauga, Pell City, and Alexander City plants and in the course of its surveys contacted a number of Respondent's employees (R. II, 13). The evidence shows, moreover, that sometime early in November, 1954, the Union organizers gave to some sixty of the employees in Respondent's Sylacauga Mills, from ten to sixty union membership cards each, for the purpose of having these cards signed in connection with the Union's organizing campaign (R. II, 11-13). The evidence shows, and the Trial Examiner found, as did the Court below, that immediately thereafter a number of employees began to engage in widespead solicitation of Union memberships in Respondent's Mills during work time: This was observed by Supervisors. There were complaints to the Supervisors from employees about this, and complaints from Supervisors in one Department to Supervisors in other Departments about their employees leaving the Departments in which they worked and going into other Departments during working hours to solicit other employees at work, on behalf of the Union (R. I, 71, R. II, 77, 86, 157, R. III, 4-6, 9, 10, 16, 22, 23, 25, 26, 48).

The evidence shows that Respondent does not prohibit general discussions of any matter by employees in its plant during non-work time, i. e., not only on its premises, but also during periods when employees are in the smoking areas, rest rooms, eating lunch, etc. (R. II, 152). The evidence shows, moveover, that Respondent has had, for a number of years, a rule prohibiting any solicitation within

its plants during actual work time for any purpose, or cause, other than the annual Red Cross Charity solicitation, and that from time to time this rule has been called to the attention of employees (R. II, 152).

Moreover, the evidence shows that it has been Respondent's consistent practice in the sixty years of its existence not to have written rules (R. I, 72). Respondent has never published its rules, practices, and instructions by posting notices on its bulletin boards, issuing detailed written instructions, or any like device, but rather, it has distributed in writing only the general policy statement on rules contained in the booklet entitled "An Introduction to Avondale" (G. C. Ex. 2, R. III, 55) to wit:

> "2. Compliance with Rules. It is necessary to have plant rules regarding conduct, safety and housekeeping. These rules are designed for the protection and well being of all.
>
> "3. Maximum Efficiency. High production and quality enable Avondale to compete successfully with other mills in the industry and are the sources of profits to be shared . . .
>
> "5. Personal Interest in Avondale. Your interest, both in your own job and in the over-all program of the Company, is necessary for the maximum success of the partnership program . . . "

Beyond this, all rules and policies affecting employees are conveyed by oral communication from supervision to employees. Many rules, policies, and practices have not been reduced to specific terms but have existed as a matter of custom and practice, and they have become accepted by traditional knowledge that there is a certain type of conduct which is expected of employees and certain other conduct which is prohibited. Among its other practices, Respondent follows a practice of not disciplining any em-

ployee for violation of rules, directions, or policies, until the rule, direction, or policy has been expressly called to the attention of the employee and he has been advised that future violations will result in discharge or discipline.

The Trial Examiner, based on the evidence, found, moreover, that prior to the widespread in-plant solicitation for union membership, at least one employee (a Board witness) had been expressly warned about solicitation in Respondent's plant during working hours, as a result of his circulating a petition seeking a pardon for his son who was then in the penitentiary (R. II, 81, 82). This employee testified that his Supervisor told him: "You know the Company won't allow you soliciting on the job" (R. II, 82). This same employee (G. C. Cook) was later reprimanded for engaging in union solicitation on the job. He nevertheless testified that he had no knowledge of any rule against solicitation while at work (R. II, 80, 81).

The evidence shows, moreover, that the employees produced as witnesses for the General Counsel of the Board, and who testified about being warned against future violations of the rule against in-plant solicitation during work time were not "singled out" for warning, except as a result of actual observation, or of a particular report or complaint by some other employee, or by some Supervisor, that they were interfering with others while on the job, or neglecting their own jobs as a result of their solicitation during work time (R. III, 8, 22, R. II, 77, 85, 32, 135, 160). A number of them testified that as of the time they were warned against future solicitation while at work, they were not aware of Respondent's rule against such solicitation. Others, on the other hand, testified that they knew that soliciting on the job was against the plant rules; and as stated above, at least one of the Board's witnesses testified to a previous warning for solicitation on the job in connection with a matter not remotely connected with union activities.

The Trial Examiner found:

". . . Respondent contends that the basis of its warning was a recognized rule in industry generally, and in Avondale certainly as a plant rule, that 'working time is for work', and that no solicitation of any kind was countenanced without disciplinary action after warning; and that this restatement of its existing rule was necessary when it became apparent that there was extensive union solicitation being carried on which was interfering with production and efficiency and was causing complaints by employees who were being interfered with at their jobs. On the basis of the entire record, the Trial Examiner finds that there was a valid but unwritten rule against solicitation of any kind on working time—excepting only the annual 'Red Cross' charity drive, and that the warning was predicated thereon.

"Therefore, unless inherently bad solely because the warning was limited to union solicitation, and if not discriminatorily applied and used as a pretext, the rule was sound. Cf. Peyton Packing Co., supra. Also to argue that the rule was invalid because not formulated and enforced until the union adherents began soliciting is a philosophic non sequitor—otherwise, the occasion would never have arisen. The testimonies of plant Superintendents Callaway and Pasley, together with those of Foremen Gunter, Pickren and Forbus indicate that the solicitation activity was interfering with production and plant efficiency. Therefore, it cannot be held that it was adopted and enforced without any regard to business necessity for the purpose of impeding employees' self-organizational efforts by interfering, restraining, and coercing them when employees were leaving their jobs to solicit union membership of working employees. This is precisely what happened. Again, the test is whether a presumptively

valid rule was discriminatorily applied, and the burden of proof was on the General Counsel to prove otherwise. He did not sustain that burden . . ." (R. I, 98, 99).

The evidence moreover establishes that after the warning and notification by the Respondent of its rule against solicitation during working hours by employees supposed to be at work, or of employees supposed to be at work, that three of the employees, who had been warned, thereafter again violated the rule by engaging in solicitation during their working hours or by soliciting other employees who were at work. Two of these cases are here before this Court in the present status of this matter.

One involves John Rich, who, after having been expressly warned against future solicitation while on the job and after being instructed that he must stay on the job during the time he was supposed to be at work, nevertheless during the same week in which he received the warning, left his own Department at a time when he was supposed to be at work and solicited another employee who was at work in another Department on his job, to sign a Union card and to join him in soliciting others in his Department to sign membership cards (R. III, 18). This was reported to the Supervisor of the employee being solicited by Rich, who in turn reported it to Rich's own Supervisor. When Rich was called in by his own Supervisor, he admitted having engaged in such solicitation during work hours and after his previous warning (R. III, 3, 4, 18, 19). He was suspended and ultimately discharged for violating the rule. There was no dispute of fact whatsoever as to Rich's violation of the rule after warning. The Trial Examiner found, as Rich's own testimony required, that Rich was aware of the rule and that he actually violated it after being expressly warned that he must obey the rule in the future or he would be discharged, and that Rich admitted these facts. The Board made no different or con-

trary finding of fact as to the circumstances of Rich's discharge.

As to Calvin Parker, the evidence shows that Parker had solicited one employee several times during the night of November 12 in an effort to get him to sign a Union card; that in order to perform this solicitation Parker had to leave his job while he was supposed to be at work on it, and while his job in fact required his presence in order to keep his machine running, and go some distance from his own place of work to the place of work of the employee, Craddock, who was also at work, in order to solicit him to join the Union. This solicitation of Craddock by Parker continued throughout the entire shift. Ultimately, Craddock testified, he signed a card in order that Parker would let him alone and permit him to continue to do his job (R. III, 21). When Craddock next saw his Foreman he reported to him the facts as to Parker's solicitation of him while on his job, and while Parker was also supposed to be at work (R. III, 21, 34). When Parker reported for work at the beginning of his next shift, he was called in and given a specific warning that future solicitation on Company time—that is, during his own working hours or those of persons who were at work, would result in his discharge (RA 384, 403). Thereafter, during the same evening and later in the same shift, Parker not only ignored this warning, but deliberately and flagrantly violated the no-solicitation rule again, by soliciting another employee to join the Union during Parker's own working hours before the other employee had begun work and again soliciting him to join the Union or to sign a Union membership car after this employee began his work. This was reported to the Supervisor by the employee solicited (R. II, 158). As a result of this report, Parker was sent for by his Supervisor, suspended, and ultimately discharged. While Parker denied the above in part, the evidence shows that Parker, in the course of his effort to have his sus-

pension or discharge rescinded, admitted at least on one occasion that he had in fact solicited in violation of the rule after the previous warning (R. III, 32). The Trial Examiner found:

> ". . . In view of the corroboration of Pickren's testimony and the equivocal and diffusive testimony of Parker himself, the conflict is resolved in favor of Pickren's version. Accordingly, the Trial Examiner finds that Parker solicited union memberships of employees on the job after having been warned that such solicitation was in violation of a company rule, and his resultant discharge was not in violation of the Act as being discriminatory. Accordingly, it will be recommended to the Board that the allegation be dismissed . . ." (R. I, 97).

The General Counsel for the Board in its Exceptions to the Intermediate Report of the Trial Examiner did not except to the Trial Examiner's credibility findings as to Parker. The Board in its Order made no finding of facts as to the circumstances of Parker's discharge contrary to those of the Trial Examiner.

The third employee who was discharged for violation of the rule was an employee named James Melvin Jones. There was a dispute of fact in the evidence as to whether or not Jones, who had been warned against future solicitation in the plant and while on the job did, thereafter, again violate the rule. The Trial Examiner found that the suspension and discharge of Jones was as a result of his solicitation of other employees during working hours after having been warned against such activity in violation of the rule in the future under penalty of discharge.

The Board in its Decision and Order made specific contrary findings of fact to those of the Trial Examiner as to Jones' conduct after the warning. It reversed the Trial Examiner's factual findings as to Jones and held that

Jones' discharge was discriminatory even though the rule might be valid:

> " . . . We are convinced by the foregoing evidence, more particularly, the Respondent's efforts to persuade Jones to cease his union activities, the summary nature of his layoff and discharge without giving him an opportunity to prove that he did not violate the rule, the fact that he did not engage in the prohibited solicitation, the statements made to Jones by ranking company officials, the Respondent's hostility to the Union as well as its other unfair labor practices, that it was Jones' adherence to the Union rather than his asserted disregard of a prior warning that motivated the Respondent in laying off and then discharging Jones. Accordingly, we find, contrary to the Trial Examiner, that, apart from the question of the validity of the no-solicitation rule, the Respondent discriminated against Jones in violation of Section 8 (a) (3) and (1) of the act . . . " (R. I, 123).

The Trial Examiner, based on the evidence before him, also found there were certain violations of Section 8 (a) (1) committed by certain of the Supervisors of Respondent subsequent to the invocation of the no-solicitation rule. These violations were in the nature of interrogation and several comments or remarks made by Supervisors which the Trial Examiner found to be coercive or threatening and therefore violative of the Act; and one instance in which a Supervisor during non-work time asked an employee if he wished to withdraw his union application. The Trial Examiner's findings and recommendations in connection with these instances were not excepted to by the Respondent. The Board affirmed them. When the matter was brought before the Court below for enforcement, the Respondent did not there resist enforcement of the Board's Order in these particulars. Respondent limited its re-

sistence to the enforcement by the Court below of that part of the Board's Order which directed the reinstatement of Rich, Parker, and Jones.

The Court, in its Opinion, found that substantial evidence in the Record as a whole did not support the Board's finding that the Company's no-solicitation rule was invoked for discriminatory reasons, and that it was not discriminatorily applied to Rich and Parker, holding:

> "... On the first issue, then, we agree with the Trial Examiner and find there was no substantial evidence to support the Board" (R. I, 134).

On the second issue, the discharge of Jones, the Court held:

> "On the second issue, whether employee Jones was nevertheless discriminatorily discharged, we think that the Board's findings, though contrary to those of the Examiner, are supported by substantial evidence in the Record as a whole and hence should be sustained by us ..." (R. I, 134).

A Petition for Reconsideration as to the first issue was filed with the Court below. That Petition was denied by the Court (R. I, 137-139).

SUMMARY OF ARGUMENT.

A. The Issue Here Is a Purely Factual Issue Growing Out of the Board's Disagreement With the Evaluation of and the Weight Given the Evidence in the Record When Considered as a Whole by the Court Below. The Act Charges Courts of Appeal With the Responsibility for Granting or Denying Enforcement of Labor Board Orders. This Court Has Said It Will Not Reverse a Court of Appeals in Such Matter Because It May Differ With the Court of Appeals' Appraisal of the Evidence.

The Board seeks in this Petition for Certiorari to have this Court review and reappraise the weight and sufficiency of the evidence in the Record and to decide a conflict between the Court below and the Board, not a conflict between the Circuit Courts of Appeal. The issues involved herein do not present any conflict of principles of law. The Board, the Court below, and the Respondent all rely upon the principles enunciated in **Peyton Packing Company**, 49 NLRB 828, aff. 142 F. 2d 1009, 5th Cir. All recognize that Respondent had a legal right to invoke and enforce a rule against solicitation on its premises during the working time of its employees so long as the rule was not invoked or applied discriminatorily.

While the question upon which certiorari was sought is phrased in such a manner that upon first impression it seems to present an issue of law, an examination of the Record and a reading of the Board's Brief clearly show that the Petitioner complains of the Circuit Court's appraisal of the evidence and not of that Court's interpretation of any legal principle under the Act. The issues in this Petition for Certiorari are purely factual issues which were decided adversely to the Petitioner in the Court

below after that Court's consideration of the evidence in the Record as a whole.

The entire argument of Petitioner as contended in its Brief rests upon a recitation of evidentiary matters which it contends should have required the Court below to conclude, as a matter of fact, that Respondent's no-discrimination rule was discriminatorily invoked and applied and that the two employees involved in the Petition for Certiorari were discriminatorily discharged. On these issues both the Trial Examiner and the Court below found, as a matter of fact and contrary to the Board, that Respondent's no-solicitation rule was neither discriminatorily invoked nor applied as to the two employees involved herein. The issues which were presented to the Court below were issues involving the substantiality of the evidence in the Record which supported the Board's Order. The issue as framed and decided by the Court below was whether or not there was substantial evidence in the Record as a whole which would support the Board's Order that Respondent's no-solicitation rule was discriminatorily invoked or applied. The same issue is here presented by Petitioner in the hope that this Court will reappraise the evidence in the Record, and reach conclusions as to weight and sufficiency of evidence different from those reached by the Court of Appeals.

This Court has said it will not interfere with decisions of the Courts of Appeal involving enforcement of Labor Board orders solely for the purpose of reviewing a conflict of evidence or substituting its judgment as to the weight or substantiality of the evidence.

> ". . . Congress has charged the Courts of Appeal, and not this Court, with the normal and primary responsibility for granting or denying enforcement of Labor Board orders . . . This is not the place to review a conflict of evidence nor reverse the Court of Appeals

> because were we in its place we would find the record tilting one way rather than the other, though fair minded Judges could find it tilting either way. . . ."
>
> **(NLRB v. Pittsburgh Steamship Co.**, 340 U. S. 498, 502, 503, 95 L. ed. 479, 482, 483.)

The Petitioner has attempted to pose a legal issue to this Court and what it contends to be a conflict of law as between the circuits by adroit phraseology of a unique interpretation concerning coercive remarks which were made by several of Respondent's supervisors. What Petitioner overlooks is the fact that the coercive remarks which were made by a few of Respondent's supervisors on the several occasions as shown by the evidence do not in themselves present any unique legal issue amounting to a conflict between the circuits, but that they constitute no more than evidence to be considered along with other evidence in the record in determining the factual issue of whether or not Respondent discriminatorily invoked or applied its no-solicitation rule. Such remarks, even though violative of Section 8 (a) (1) of the Act do not automatically render invalid Respondent's otherwise valid no-solicitation rule. This same factual issue was presented to the Court below in Petitioner's Motion for Rehearing in that Court. In the Court's judgment, based upon its appraisal of the record as a whole, including the coercive remarks by supervisors, that part of the Board's Order here involved was not supported by substantial evidence in the record as a whole.

The Petitioner's argument clearly illustrates that Petitioner has departed from the question posed in its Petition for Certiorari and, instead, urges this Court to review the sufficiency of the evidence in the record and to decide, contrary to both the Trial Examiner and the Court below, that the Board's Order was supported by substantial evidence contained in the record as a whole. Petitioner hopes

that this Court will find, in its judgment, "the record tilting" in its favor and on that basis reverse the Court of Appeals' decision. This the Court, both by Congressional mandate and its own decisions, should not and will not do. Labor Management Relations Act, 1947, 10 (e), 61 Stat. 148, 29 U. S. C. (Supp. III), Sec. 160 (e), **NLRB v. Pittsburgh Steamship Co.**, supra.

B. **The Full Measure of Self-Organizational Rights of Respondent's Employees Which the Act Grants Has Not Been Impaired. The Accommodation of These Rights Should Not Be Elevated to Such a Paramount Position as to Deprive Respondent of its Equally Important Rights. The Discharges of Rich and Parker for Violation of Respondent's Rule and Directions After Being Warned Against Future Violations Were Discharges "for Cause" Within the Meaning of Section 10 (c) of the Act. The Board May Not Direct Reinstatement and Back Pay as to Employees So Discharged.**

The right of employees to engage in Union solicitation on plant property is not so unlimited as to ignore the countervailing right of an employer to the use, productivity, and enjoyment of his property. The rights of both employees and employers in this regard must be balanced so that "accommodation between the two (is) obtained with as little destruction of the one as is consistent with the maintenance of the other . . . " (**NLRB v. Babcock and Wilcox Company**, 351 U. S. 105). As this Court pointed out in **NLRB v. LeTourneau Company of Georgia**, 324 U. S. 793, 797-798, there must be "an adjustment between the undisputed right of self-organization assured to employees under the . . . Act and the equally undisputed right of employers to maintain discipline in their establishments. The rights of each should be accommodated as fully as possible without more than 'minimum impairment' to the other."

In this case, the full self-organizational rights, to which both the Board and the Courts have historically held that employees are entitled, have been maintained without impairment. Respondent has demanded that its employees' work time be devoted to work! It has **done** nothing more. Respondent has not prohibited its employees from engaging in any Union activities on its property during such times as its employees are not supposed to be working. Respondent's employees are free to engage in Union solicitation or other Union activities while on Respondent's property during such time as they are in smoking areas, rest rooms, or lunch periods, and in the pre- and post-shift times. Congress did not intend that employers' right to expect and require their employees to spend working time at work be subordinated to what the Board apparently contends is a right of employees to engage in Union solicitation or other self-organizational activities during actual work time (Report of the Committee of Conference on Labor-Management Relations Act of 1947).

The Board urges that because several of Respondent's supervisors engaged in what the Board found to be coercive, anti-union actions in violation of Section 8 (a) (1) of the Act, Respondent has therefore forfeited its right to expect and demand that its employees' working time be devoted to work and that they not leave their jobs during such time to engage in extraneous activity. The Board urges that Respondent be penalized in this manner even though the self-organizational rights of Respondent's employees are more than amply preserved by their right of having full opportunity to engage in union solicitation or other self-organizational activities off company property and on company property at all times except when they are supposed to be working. The fact that they may not utilize their actual work time to exercise these rights is merely a minimum accommodation of their rights to the equally important rights of their employer.

What the Board seeks to do is to make paramount the rights of employees under Section 7 of the Act in complete disregard to, and derogation of, Respondent's right to the use, control, and enjoyment of its property. Such a deprivation of property rights was not intended by Congress and the Board cannot limit the rights of Respondent to whatever extent it in its discretion dictates.

The two employees involved herein, as well as other employees, were warned that they would be subject to discipline or discharge if in the future they left their jobs to engage in solicitation or solicited other employees while they were working. In spite of the warnings the two employees, in complete disregard of Respondent's right to expect them to remain on their jobs, and its specific instructions, thereafter engaged in solicitation during times when they were supposed to be at work. They were suspended and discharged because of their flagrant disregard of Respondent's instructions and warning. Respondent certainly had a right to discharge them for violating its rule against solicitation. "The employer in his control over the property and employees is authorized to make reasonable rules for the conduct of the business and the employee is bound to obey such reasonable rules as part of his contract of hire." (**Midland Steel v. NLRB**, 113 F. F. 2d 805, 6th Cir.)

And as this Court pointed out in **NLRB v. Jones & Laughlin Steel Co.**, 301 U. S. 1, 45-46, . . . L. ed. 893, 916-17, the Act "does not interfere with the normal right of an employer to discharge its employees" and "the Board may not make its authority a pretext for interference without right unless the right of discharge is exercised discriminatorily." This Court has moreover held that within the meaning of Section 10 (c) of the Act as amended, which prohibits the Board's ordering reinstatement or back pay for employees discharged "for cause," that ". . . insubordination . . . is adequate cause for discharge

. . ." (**NLRB v. Local Union 1229, IBEW**, 346 U. S. 464, 474-5, 98 L. ed. 195, 203.)

In this case Respondent had a valid rule prohibiting solicitation by its employees on its property during times when the employees were supposed to be working. The evidence overwhelmingly shows that the two employees involved herein violated the rule after being previously warned against future violations thereof and were discharged therefor. Respondent had a right to expect them to follow its rules and to discharge them for violation. Such a right of Respondent with respect to its property and its work time is inherent and should not be invaded and denied when its employees had not been deprived of the accommodation of their self-organizational rights which the Act requires.

In the light of the discharge of Rich and Parker for cause, the Decision of the Court below as to them should be sustained independently of any action taken by this Court in connection with the **Nutone** case.

C. The Act Prescribes and the Court Below Has Decreed the Traditional Specific Remedies for the Correction of the Unfair Labor Practices Found to Have Been Committed by Respondent. In Addition to These Adequate Remedies, the Board Seeks to Impose Additional Requirements Upon Respondent Which Are Punitive in Nature and Not Remedial and Which Result in a Forfeiture of Inherent Rights of Respondent. Such Punitive Remedies Are Beyond the Scope, Power and Authority Vested in the Board by the Act.

For the violations of Section 8 (a) (1) of the Act committed by Respondent's Supervisors, the Board and the Court below have provided a complete, adequate and specific remedy. Respondent has been ordered and required to cease and desist from such activities under the penalty

of contempt for such future conduct. This is the remedy which was envisioned by Congress and has traditionally been followed by the Board under the Act and universally upheld by the Courts. The Act does not authorize the Board to apply or prescribe any penalty which it, in its discretion, believes might effectuate the policies of the Act. The powers of the Board, by law, are remedial, not punitive. **Consolidated Edison v. NLRB**, 305 U. S. 197, 235, 236, 83 L. ed. 126, 143, 144.

The Board may not apply a remedy which deprives an employer of his normal right to control the working time of employees while they are on their jobs, or deprives him of it simply because the employer's supervisory employees discuss unions or make anti-union remarks on its premises during the non-supervisory employees' working time.

The Board overlooks the vast and inherent difference between the nature of the duties and functions of supervisory and non-supervisory employees. The jobs of Respondent's Supervisors require them to move about in the plant, during work time, to make themselves aware of conditions of their subordinate employees' jobs while they are running; to instruct these employees; to communicate orders, directions and information to them; and discuss theirs and the Company's production problems and other policies with them. On the other hand, it is the primary duty of non-supervisory employees to stay on their jobs and run them when they are supposed to be running. They are not to leave their jobs during the time they are required to run them to utilize such time to engage in extraneous activities.

If, during the course of carrying out his duties and functions, which are different from those of a non-supervisory employee, a supervisory employee expresses views or makes remarks found to be violative of the Act, such conduct does not thereby enlarge the scope of the Act or the powers of the Board so as to enable the Board to require and direct

an employer to permit its non-supervisory employees thereafter to desert their jobs at will and engage in solicitation or other activities if and when they deem it desirable. If a Supervisor exceeds the permissible limitations of the Act, or as a result of his comments, conversations or actions violated the Act, there is a specific remedy to rectify such violations of the Act. This does not, however, as a consequence, so expand the Act as to extend the scope of the employee rights beyond the point of balance required between the rights of self-organization and the employer's property rights.

Respondent may not be required, as the Board seeks to do here, to make its premises and work time available to the union for its use as a penalty for its having committed an unfair labor practice under the Act, or as a penalty for Supervisors' comments which have gone beyond the point which an employer may go in the exercise of its protected right of free speech. **NLRB v. Stowe Spinning Co.**, 336 U. S. 226, 98 L. ed. 638, 646.

ARGUMENT.

A. The Issue Here Is a Purely Factual Issue Growing Out of the Board's Disagreement With the Evaluation of and the Weight Given the Evidence in the Record When Considered as a Whole by the Court Below. The Act Charges Courts of Appeal With the Responsibility for Granting or Denying Enforcement of Labor Board Orders. This Court Has Said It Will Not Reverse a Court of Appeals in Such Matter Because It May Differ With the Court of Appeals' Appraisal of the Evidence.

The issue involved in the Petition for Certiorari and in the instant matter is not, we submit, an issue of law, but is an issue of fact which grows out of the Board's seeking to have this Court agree with its evaluation of the evidence in lieu of that made by the Court below as a result of its examination of the evidence in the Record considered as a whole. The issue here involved has consistently been an issue of fact; it was an issue of fact insofar as the Petition for Enforcement in the Court of Appeals was concerned; it was an issue of fact insofar as the Petition for Rehearing by the Court of Appeals was concerned; and it continues to be an issue of fact as it is stated and argued in the Brief of the Petitioner in this Court.

Respondent submits that while the question as posed in the Petition for Certiorari gives the appearance of raising a purely legal issue, that is merely as a result of adroit phraseology and does not in fact present the true issue here. This is clearly established by the actual argument and detailed contentions in Petitioner's Brief to this Court in the instant matter, which clearly establish that the Petitioner here is in fact asking this Court to review and reverse the factual determinations made, and the weight given certain evidence by the Court of Appeals below on the basis of its examination of the entire Record, because

that Court's determination as to the evidence differs in this regard from the conclusions reached by the Board in its reversal of the Trial Examiner's Findings and Recommendations.

The Respondent, the Petitioner, the Trial Examiner, and the Court below all rely upon the holdings and principles enunciated in the **Peyton Packing** case, 49 NLRB 828, Aff. 142 F. 2d 1009, 5th Cir., and the application of those principles to the facts here. Each ultimately concedes that Respondent has a legal right to invoke and enforce a rule against solicitation on its premises during the working time of its production employees in order to protect its property, its production, its discipline, or to meet its business needs. All concede that the rule invoked by the Respondent here was limited to solicitation by employees during the period when they were supposed to be at work and that the rule did not interfere with solicitation during the free time of employees during their working hours or with solicitation by them on Respondent's premises during non-working hours. Such a rule is in keeping with normal and almost universally accepted industrial practice. Rules imposing even greater limitations on employees' work time solicitation than Respondent's rule have been consistently upheld by the Courts as being properly within management's right to control its property, protect its production, efficiency, or discipline.[1]

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[1] *Republic Aviation v. NLRB*, 324 U. S. 793, 803; *NLRB v. LeTourneau*, 324 U. S. 793; *NLRB v. Babcock & Wilcox*, 351 U. S. 105, 114; *Boeing Airplane Co. v. NLRB*, 140 F. 2d 423, 10th Cir.; *Keystone Steel & Iron Co. v. NLRB*, 155 F. 2d 553, 7th Cir., vacated on other grounds 332 U. S. 833; *NLRB v. Montgomery Ward*, 157 F. 2d 486, 8th Cir.; *Rubin Bros. Footwear v. NLRB*, 203 F. 2d 486, 5th Cir.; *NLRB v. May Dept. Stores*, 154 F. 2d 533, 8th Cir., cert. den. 329 U. S. 725; *Marshall Field Co. v. NLRB*, 200 F. 2d 375, 7th Cir.; *Caterpillar Tractor Co. v. NLRB*, 230 F. 2d 357, 7th Cir.; *NLRB v. Edinburg Citrus Assn.*, 147 F. 2d 353, 5th Cir.; *NLRB v. American Thread Co.*, 210 F. 2d 381, 5th Cir.; *NLRB v. Clearwater Finishing Co.*, 216 F. 2d 608, 4th Cir.; *Milwaukee Electric Tool Co. v. NLRB*, 237 F. 2d 75, 7th

The ultimate question presented by the Petitioner to the Court of Appeals below, and to this Court, is whether or not the rule was invoked or applied, insofar as Parker, Rich, and others similarly situated are concerned, in a discriminatory manner or for a purpose interdicted by the National Labor Relations Act, as amended. The issue as to this is a pure and simple issue of fact. The Trial Examiner, whose Intermediate Report was, by virtue of the Decision of this Court in **Universal Camera v. NLRB**, 340 U. S. 474, 96 L. ed. 456,[2] a part of the Record as a whole to be considered by the reviewing Court of Appeals, found that the Respondent invoked its long-standing no-

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Cir.; *NLRB v. Enid Cooperative Creamery*, 169 F. 2d 986, 10th Cir.; *Denver Tent & Awning Co. v. NLRB*, 138 F. 2d 410, 10th Cir.; *NLRB v. Mylan Sparta Co.*, 166 F. 2d 485, 6th Cir.; *NLRB v. Williamson Dickie Co.*, 130 F. 2d 260, 5th Cir.; *Bonwit Teller v. NLRB*, 197 F. 2d 640, 2nd Cir., cert. den. 343 U. S. 905; *NLRB v. Glenn L. Martin*, 141 F. 2d 371, 8th Cir.; *NLRB v. Brandeis & Sons*, 145 F. 2d 556, 8th Cir.; *NLRB v. American Tube Bending Co.*, 205 F. 2d 45, 2nd Cir.; *Peyton Packing Co. v. NLRB*, 142 F. 2d 1009, 5th Cir., cert. den. 323 U. S. 730; *NLRB v. Carter Carburetor Corp.*, 140 F. 2d 714, 8th Cir.; *NLRB v. F. W. Woolworth*, 214 F. 2d 78, 6th Cir.; *Midland Steel Products Co. v. NLRB*, 113 F. 2d 800, 6th Cir.

2 ". . . The 'substantial evidence' standard is not modified in any way when the Board and its examiner disagree. We intend only to recognize that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion. The findings of the examiner are to be considered along with the consistency and inherent probability of testimony. The significance of his report, of course, depends largely on the importance of credibility in the particular case. To give it this significance does not seem to us materially more difficult than to heed the other factors which in sum determine whether evidence is 'substantial.' . . . On reconsideration of the record it (the Court of Appeals) should accord the findings of the Trial Examiner the relevance they reasonably command in answering the comprehensive question of whether the evidence supporting the Board's order is substantial . . ."

(*Universal Camera Corp. v. NLRB.*, 340 U. S. 474, 496, 497, 95 L. ed. 456, 472.)

solicitation rule in keeping with its normal and traditional practice, procedure, and policy as to the invocation of all its rules; that the Respondent invoked the rule because of the actual and potential interference with its production, plant efficiency, and discipline which flowed from the widespread on-the-job solicitation which began in its several plants early in November, 1954; that the rule was not discriminatorily applied insofar as the three persons discharged were concerned; and that their discharges, as a result of their violations of the no-solicitation rule after being expressly warned against future violations of the rule, were not violative of the Act. The Intermediate Report clearly detailed the evidence in the Record, based upon the actual testimony, which supported the Trial Examiner's Findings as to the validity of the rule and the legality of the discharges, and particularly as to the discharges of Parker and Rich.

The Board, in its Order, reversed these Findings of its Trial Examiner. It did not, however, make any findings of facts which were contrary to those of the Trial Examiner insofar as the application of the no-solicitation rule to Rich and Parker was concerned as, indeed, it could not in the light of the evidence as to their subsequent specific violations of Respondent's no-solicitation rule after having been expressly warned that future violations would lead to discharge. Instead, the Board held their discharges violative of the Act as a result of its drawing inferences, contrary to the undisputed evidence, of alleged ulterior motives in the promulgation and invocation of the rule, namely, that Respondent's sole purpose in invoking its rule against employees' soliciting during their work time was to "impede the self-organizational efforts of its employees."

The basis upon which the Board predicated this inference, albeit, we submit, in conflict with the undisputed evidence, was:

(a) Because Respondent did not invoke or make its employees currently aware of its long-standing rule against solicitation during work time until after such solicitation had begun and until after it became sufficiently widespread to be apparent to Respondent; and

(b) Because when Respondent did invoke and bring to the attention of its employees its rule against solicitation during work time, it did so by the techniques and methods which Respondent had traditionally used to invoke and publicize all of its rules. In this connection the Board specified the practices and methods of publicizing such a rule which it preferred. It found that Respondent had an illegal motive in promulgating its rule since it followed a different method of publicizing it from that preferred by the Board. The evidence was clear that Respondent's normal method and procedure followed in connection with all of its rules was to orally notify employees individually of the existence of the rule and to caution them that future violation of the rule would result in discipline or discharge; and

(c) While the Board set forth no basis in the Record upon which it disagreed with the Findings of the Trial Examiner that this work time solicitation in Respondent's plants resulted in interference with production and plant efficiency, it nevertheless concluded that since Respondent had failed to make a quantitative showing in the Record of the "extent" to which the solicitation interfered with production, that it could conclude, in spite of the undisputed evidence to the contrary, that such solicitation during working hours did not "seriously" interfere with production or efficiency; and that, therefore, the rule must have been invoked for an illegal and discriminatory purpose, rather than for a purpose of relating to business necessity such as maintenance of production, efficiency, or discipline.

(d) The Board held that the fact that on four or five occasions subsequent to the invocation of the rule, Respondent's Supervisors interrogated or made remarks to employees while in the plant which it construed to be coercive or threatening, and the fact that "talking on a variety of subjects" was permitted in the plant by employees and Supervisors alike, proved that Respondent did not require a limitation on the non-work activity of its employees during work time for business purposes and that, therefore, Respondent's making and enforcing a rule prohibiting solicitation during work time was a "device" to defeat self-organizational rights of employees; and

(e) Finally, the Board found that assuming the rule was valid and non-discriminatory, that insofar as it was applied in the case of Jones it was discriminatory because, according to the Board, Jones did not in fact violate the letter of the rule subsequent to his being warned against future violations thereof.

When the case reached the Court of Appeals below, the questions to be determined as set out by the Petitioner in its Brief to the Court in support of its Petition for Enforcement, were:

> "(1) Whether **substantial evidence supported** the Board's finding that Respondent violated Section 8 (a) (1) of the Act by discriminatorily promulgating or reviving its no-solicitation rule and violated Section 8 (a) (1) and (3) of the Act by discharging employees for violation of the rule.
>
> "(2) Whether **substantial evidence supported** the Board's finding that Respondent discriminatorily discharged employee Jones in violation of Section 8 (a) (1) and (3) of the Act, even assuming that Respondent did not discriminatorily apply its rule against solicitation." (Emphasis supplied.)

Respondent in its Response and Answer to the Petition for Enforcement in the Court below denied that it had committed the alleged unfair labor practices and contended specifically:

> "Respondent shows, moreover, that the said Decision and Order of the Board is not supported by substantial evidence in the Record considered as a whole . . . moreover, . . . the evidence in the Record considered as a whole sustains and supports the recommendation of the Board's Trial Examiner that this Respondent did not discharge or otherwise discriminate against James M. Jones, John Rich, and Grover W. Parker in violation of Sections 8 (a) (3) or 8 (a) (1) of the National Labor Relations Act as amended . . . " (R. I, 6).

On the issues thus drawn by the parties, the Court below in its Decision stated the issue as follows:

> "The issues here are: 1. Whether substantial evidence on the record as a whole supports the Board's finding that the Company's no-solicitation rule was invoked and applied for discriminatory reasons, and 2, assuming that it was not, whether there is other substantial evidence to support the Board's finding that Respondent discriminatorily discharged employee Jones" (Op. Court, below) (R. I, 133).

Thus the Petitioner and the Respondent argued and the Court below reached its Decision on the sole question of whether or not the evidence in the Record, considered as a whole, supported the Board's Findings and Order.

The question as stated to this Court in the Petition for Certiorari purportedly departs from this actual factual issue and poses the question upon which certiorari was sought thusly:

> "Whether a rule prohibiting employees from engaging in pro-union solicitation during working hours

otherwise valid under the tests enunciated by this Court is invalidly applied if the employer himself is engaging in unlawful, coercive, and anti-union solicitation during working hours" (Pet. for Cert. p. 2).

Petitioner's Brief to this Court on the merits shows moreover that Petitioner is actually seeking a reversal of the Decision below on the basis of its disagreement with the evaluation of and weight given by the evidence by the Court below. The Petitioner's position as set out in its Brief is:

> "We nonetheless believe that the decision in this case should be reversed, as the conduct of the employer here establishes discriminatory motivation in the invocation and application of the no-solicitation rule . . . " (Pet. Brief, page 13).[3]

Thus the issues actually before this Court in this matter are:

(1) The factual issue of whether or not the employees' solicitation during their work time interfered with Respondent's production, or was so related to production, plant efficiency, or discipline as to warrant its exercising

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[3] See also the concluding paragraph of Petitioner's Brief, where the Petitioner argues for reversal of the Decision of the Court below on the following basis:

> "The court below conceded that an 'otherwise valid no-solicitation rule * * * cannot be invoked or applied for a discriminatory purpose.' It concluded, however, that since the evidence failed to establish that 'any solicitation in violation of the rule had ever been permitted,' the record lacked 'substantial evidence of an unlawful and discriminatory purpose in invoking and applying (the) no-solicitation rule' (R. I, 133-134). If the court's factual premise had any support in the record, then the difference between the Board and the court would involve no more than a mere disagreement between the two tribunals in their appraisal of conflicting evidence. But 'the facts are to the contrary * * *' National Labor Relations Board v. Warren Co., 350 U. S. 107, 110. . . ." (Pet. Brief p. 18).

its inherent right to invoke or revive its rule against solicitation during work time. In this particular the Trial Examiner found, based upon his evaluation of the evidence:

> "The testimonies of Plant Superintendent Callaway and Pasley together with those of Foremen Gunter, Pickren, and Forbus indicate that the solicitation activity was interfering with production and plant efficiency. Therefore, it cannot be held that it was adopted and enforced without any regard to business necessity . . . when employees were leaving their jobs to solicit union membership of working employees. This is precisely what happened" (R. I, 99).

In its Decision, the Board, in spite of the above referred evidence held:

> "There is no concrete evidence in the Record showing **the extent**, if any, that production was impaired by union solicitation" (R. I, 120). (Emphasis supplied.)

The Court below on its review and consideration of the Record as a whole, found:

> "There is no dispute in the evidence that solicitation of Union membership during work hours had interfered with production and plant efficiency . . ." (R. I, 134).

(2) The factual issue growing out of Respondent's method of making employees aware of this rule and the timing of its invocation or revival. The Trial Examiner, based on the evidence and his observation of the witnesses, found:

> ". . . (the plant rules, being unwritten, were matters of custom, some possibly dating back nearly 60 years.) . . ."
>
> ". . . Immediately after becoming aware of the Union organizing campaign together with reports of

> various employees attempting to solicit Union memberships during working hours from employees who were working, management invoked its so-called 'no-solicitation' rule . . . Other than for the annual Community Red Cross Drive, no solicitation of any kind was permitted in Avondale, as is evidenced by the warning previously given an employee, who was circulating a petition seeking a pardon for his son who was in the penitentiary . . . To argue that the rule was invalid because not formulated and entered until the Union adherents began soliciting is a philosophic non sequitor—otherwise the occasion would never have arisen . . ." (R. I, 73).

The Board, in disregard of the evidence, said in reversing the Trial Examiner:

> ". . . Thus, instead of generally publicizing its newly adopted or revised rule to employees, as one would expect of an employer solely concerned with production and efficiency, the Respondent at the very inception of the Union's membership drive singled out a number of employees ostensibly suspected of engaging in union solicitation during working hours to be warned against a repetition of the reported offense . . ." (R. I, 118).

On this issue the Court below, on the basis of its review of the Record, as a whole, and its evaluation of the evidence, found:

> ". . . the consistent policy of the company has been not to have written rules, but to rely upon rules and policies evolved from and proved workable in custom and practice, including a practice not to discipline an employee for violation of a rule until the rule had been expressly called to his attention and he had been advised that future violations would result in discharge or discipline. Such matters as hours of work, lunch periods, order in the plant, quality stand-

ards, etc., were all regulated by custom and no written rules were posted in the plant. . . .

". . . There is no dispute in the evidence that solicitation of union membership during work hours had interfered with production and plant efficiency and that when that became obvious the Company took action by making its employees aware of the no-solicitation rule in the same manner that it made them aware of its other rules. That much the Company had a right to do. The fact that the rule had not been posted or otherwise publicized before the occasion for its use arose is consistent with the Company's practice as to all of its rules . . ." (R. I, 132, 134).

(3) On the issue of the application of the rule, insofar as Parker and Rich were concerned, the Trial Examiner found, on the basis of the evidence, as to Rich:

"Rich was called into the office at 10:30 the night of November 11th by Foreman Gunter, and in the presence of Forbus was read the warning against solicitation, and was told that **no** union activity would be permitted on the job. Rich admitted that he had given out a few cards but promised not to give out any more cards in the plant. This meeting ended with Rich asking: 'What does this mean, am I fired? And he said, No, you forget it and I'll forget it. He said, I don't want any more on the job.' However, Rich continued his advocacy of the union with employees in other departments during working time and on November 17th a week after he was warned, he was again reported to Gunter[4] for soliciting on the job . . ." (R. I, 89).

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[4] ". . . According to Gunter, the reason for the suspension and subsequent termination of Rich was his solicitation of the elevator operator Glidden Holt on the November 17th shift. Rich, on cross-examination, also admitted 'soliciting' one of the female employees for union membership while she was at work. Both worked

And, as to Parker:

". . . Parker admitted that he had been soliciting on November 12th, but contended that he did not ask anybody to sign a card in the plant, and only at 'clean-up hours' or in the bathroom. During these times he had gotten Joe Baker, J. T. Downs, James Patterson, and Billy Craddock to sign up. Asked if he had solicited anyone to sign a card in the beaming room, Parker answered: 'I had them in the beaming room if they wanted to sign they could have.' The Trial Examiner found Parker's extensive testimony diffused, and his demeanor and deportment on the stand rendered his recitals suspect.

"Pickren's version was that he talked to Parker on two occasions, the first on Tuesday night, November 16th 'right at ten o'clock' and again Wednesday morning, November 17th. He testified that he said to Parker: 'We have already told you one time about soliciting on the job and it has been brought to my attention again. He said that he knew about it and said he didn't think he was going to get into trouble. I told him I was suspending him for 30 days . . .'" (R. I, 95).

". . . In view of the corroboration of Pickren's testimony[5] and the equivocal and diffusive testimony of

in departments other than his own. Subsequently Rich appeared before and appealed his suspension and discharge to Superintendent Callaway, Personnel Officer Cleghorn, B. H. Haynes, and finally the president of Avondale, J. Craig Smith—all of whom affirmed Rich's discharge for violating the rule, after warning against soliciting union memberships while on company time from persons who were working.' The Company's definition was the literal application of the one set forth in the *Peyton Packing Company* case (supra), and Rich's discharge came within its purview. Accordingly, I shall recommend to the Board that the complaint be dismissed as to Rich" (R. I, 90, 91).

[5] ". . . Thomas I. Craddock, a beamer tender ordinarily employed on the second shift, but who had asked for the third shift

Parker himself, the conflict is resolved in favor of Pickren's version. Accordingly, the Trial Examiner finds that Parker solicited union memberships of employees on the job after having been warned that such solicitation was in violation of a company rule, and his resultant discharge was not in violation of the Act as being discriminatory. Accordingly, it will be recommended to the Board that the allegation be dismissed . . ." (R. I, 97).

The Board, in its Decision, said:

". . . That the Respondent was prompted to invoke the no-solicitation rule by a desire to prevent unionization of its employees rather than by consideration of plant production and efficiency, as the Respondent argues, is also indicated by the fact that talking on a variety of subjects was permitted in the plant. This included union discussions in which both employees and supervisors participated . . ."

". . . Viewing the foregoing evidence in the light of the Respondent's other unfair labor practices, we are convinced that the Respondent invoked its so-called no-solicitation rule as a device to defeat its

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on November 12th in order to attend a high school football game, was working on the 5th frame near Parker who was on the 9th frame. Craddock testified as to a conversation with Parker began, stating: 'At first he came in there when he first came to work, after the ball game when we first came to work, before we clocked in, he wanted to sign a union card. I told him I didn't want to sign one.' But, he stated that Parker came twice again to his frame during work, with the result that Craddock signed the card. Craddock subsequently reported the facts to Pickren."

". . . Arthur D. Elrod, a tender on the first shift which follows the third shift on which Parker worked, testified that he came in at 5:30 on Wednesday, November 17th, and shortly thereafter Parker came into the bathroom 'where I was and asked me would I sign a card.' Unsuccessful at this time, Parker returned around 6 after he had gone on the job and requested him to sign a card, and also asked him to go to a union meeting. Elrod, likewise, reported the facts to Supervisor Pickren" (R. I, 96, 97).

employees' self-organizational efforts. Accordingly, we find, contrary to the Trial Examiner, that the Respondent thereby violated Section 8 (a) (1) of the Act. As Jones, Rich and Parker were laid off and ultimately discharged for violating this rule, we find that the Respondent discriminated against them within the meaning of Section 8 (a) (3) and (1) of the Act . . ." (R. I, 119, 120).

The Decision of the Court below in this particular was:

". . . The evidence fails to establish that any solicitation in violation of the rule had ever been permitted. Nor does the fact alone that the Company was opposed to the Union, as was its lawful right, furnish substantial evidence of an unlawful and discriminatory purpose in invoking and applying its no-solicitation rule" (R. I, 134).

(4) On the final issue of whether or not the rule was discriminatorily applied as to Jones, the Trial Examiner found that it had not been (R. I, 94); but the Board, to the contrary, found:

". . . We are convinced by . . . the Respondent's efforts to persuade Jones to cease his union activities, the summary nature of his layoff and discharge without giving him an opportunity to prove that he did not violate the rule, the fact that he did not engage in the prohibited solicitation, the statements made to Jones by ranking company officials, the Respondent's hostility to the Union as well as its other unfair labor practices, that it was Jones' adherence to the Union rather than his asserted disregard of a prior warning that motivated the Respondent in laying off and then discharging Jones. Accordingly, we find, contrary to the Trial Examiner, that apart from the question of the validity of the no-solicitation rule, the Respondent discrimi-

nated against Jones in violation of Section 8 (a) (3) and (1) of the Act . . ." (R. I, 122, 123).

In this connection, the Court below as a result of its examination of the Record, held:

". . . Without detailing the other matters mentioned by the Board, we hold there was substantial evidence to support its findings on this second issue (the finding of discrimination in the discharge of Jones) . . ." (R. I, 134).

After the Court of Appeals rendered its Decision, the Petitioner filed a Motion for Rehearing and Brief (R. I, 135-137) in which it argued that the conduct of the Supervisors found violative of Section 8 (a) (1) of the Act constituted, as a matter of fact, "unlawful anti-union solicitation in violation of Respondent's rule," thereby making the rule invalid and the discharges of Rich and Parker violative of the Act.

In its Brief in Support of its Motion for Rehearing in the Court below, Petitioner again cited the several examples of conduct by Respondent's Supervisors which had been found to be violative of Section 8 (a) (1) of the Act (the same ones cited in the Brief in Support of the Petition for Enforcement). It again contended that the Court should reconsider and find that these instances should be given sufficient evidentiary weight to cause the Court to find that the Board's conclusions as to Respondent's no-solicitation rule and the application of the rule to Rich and Parker were in fact supported by substantial evidence in the Record as a whole. The Court below denied reconsideration.

We submit that these are all factual considerations which go to the question of weight, sufficiency, and validity of the evidence in the record, rather than questions of law.

The Petitioner in its Brief to this Court still bases its contentions on these same questions of substantiality, weight, and validity of the evidence in the Record. Thus, the Petitioner is, in the final analysis, asking this Court to again review the evidence in the Record in the instant matter to see if this Court, upon its appraisal of the evidence, would reach a different conclusion on the weight and sufficiency of the evidence than that arrived at by the Court below, and to reverse the decision of the Court below on the basis of such a different evaluation of the evidence, if, indeed, it was different.

This Court has made it clear that the evaluation of the evidence in the Record in an enforcement proceeding, under the Labor Relations Act, for the purpose of determining whether substantial evidence in the Record, considered as a whole, supports the Board's Order; is the function and responsibility of the Courts of Appeals; and that this Court will not review a conflict of evidence, or reverse a Court of Appeals because it, in its place, might have found the evidence "tilting" another way. **NLRB v. Pittsburgh Steamship Co.**, 340 U. S. 498, 502-503, 95 L. ed. 479, 482-483.[6]

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[6] "But Congress has charged the Courts of Appeal and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. 'The jurisdiction of the court (of appeals) shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review . . . by the Supreme Court of the United States upon writ of certiorari . . .' Taft-Hartley Act, Sec. 10 (e), 61 Stat. 148, ch. 120, 29 U. S. C. (Supp. III), Sec. 160 (e). Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' Layne & Bowler Corp. v. Western Well Works, 261 U. S. 387, 393, 67 L. ed. 712, 714, 43 S. Ct. 422; Revised Rules of the Supreme Court of the United States, Rule 38 (5). The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of Courts of Appeals involving solely a fair assessment of a record

We submit that it is clear that the question of whether or not Respondent's no-solicitation rule was invoked to intimidate or interfere with its employees in their self-organizational activities, rather than for other reasons, is a question of fact. We submit that the question of whether Respondent was motivated by a desire to block unionization in its mills or motivated by a desire to protect its production, efficiency, or discipline in invoking its no-solicitation rule is also a question of fact. We submit that the question of whether or not the alleged comments and interrogation by Supervisors provided sufficient evidence to establish a discriminatory application of the rule as to Parker and Rich or others is a question of fact. These questions of fact, which go to whether or not substantial evidence in the Record supports the conclusions of the Board, have been adversely determined to the contention of the Board by the Court below, after an examination and evaluation of the Record. Such a determination by the Court of Appeals should be sustained here.

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on the issue of unsubstantiality, ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues.

"*This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other*, though fair-minded judges could find it tilting either way. It is not for us to invite review by this Court of decisions turning solely on evaluation of testimony where on a conscientious consideration of the entire record a Court of Appeals under the new dispensation finds the Board's order unsubstantiated. In such situations we should 'adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeals depend on appreciation of circumstances which admit of different interpretations.' Federal Trade Com. v. American Tobacco Co., 274 U. S. 543, 544, 71 L. ed. 1193, 1194, 47 S. Ct. 663. . . ."

6 *NLRB v. Pittsburgh Steamship Co.*, 340 U. S. 498, 502, 503, 95 L. ed. 479, 482, 483. (Emphasis supplied.)

B. **The Full Measure of Self-Organizational Rights of Respondent's Employees Which the Act Grants Has Not Been Impaired. The Accommodation of These Rights Should Not Be Elevated to Such a Paramount Position as to Deprive Respondent of its Equally Important Rights. The discharges of Rich and Parker for Violation of Respondent's Rule and Directions After Being Warned Against Future Violations Were Discharges "for Cause" Within the Meaning of Section 10 (c) of the Act. The Board May Not Direct Reinstatement and Back Pay as to Employees So Discharged.**

This Respondent is in full accord with the principle contended for by the Petitioner in its brief to the Court in case No. 81,[7] at pages 16-43 thereof. That principle was expressed by this Court in its decision in **NLRB v. LeTourneau Company**, 324 U. S. 792, where the Court said at Pages 797-98, that rules regarding solicitation of Union membership and distribution of literature on an employer's premises evolve out of "adjustments between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishment . . . opportunity to organize and proper discipline are both essential elements in a balanced society," and in its later decision in **NLRB v. Babcock and Wilcox Company**, 351 U. S. 105, where the Court said at Page 112, "organizational rights are granted to workers by the same authority, the national government, that preserves property rights. **Accommodation between the two must be obtained with as little destruction of the one as is consistent with the maintenance of the other** . . ." (Emphasis Supplied.) Respondent shows that in the instant matter such accommodation between self-organizational rights and property

[7] *NLRB v. United Steelworkers of America, CIO, and Nutone, Inc.*, #81. A copy of said brief having been served upon this Respondent as noted in the Petitioner's brief in the instant matter.

rights has been made. The limitation on self-organizational rights imposed by Respondent's rule against solicitation during work time is somewhat less than that which it legally could have imposed under the controlling decisions of the Board and the Courts. See footnote one, supra.

The evidence in this Record, without dispute, establishes that in the instant matter the only limitation on the self-organizational rights of employees insofar as Respondent's premises and time are concerned is its limitation on its employees using their actual work time to engage in solicitation. There is no limitation, and neither the Board nor the Court below found a limitation, on the employees soliciting in the plants during non-work time, even though it be time for which Respondent compensates them, or on Respondent's premises at any time other than work time.

The evidence moreover shows that while Respondent has had a rule against solicitation during work time for some years, it has invoked it only in keeping with its usual practice, to wit: when it comes to its attention that a rule is being violated, such rule is again called to the attention of employees by warning those who have been observed, or reported violating the rule, that future violations of the rule will result in discipline or discharge. Respondent's policy on work time solicitation gives full accommodation to the self-organizational rights of its employees while on its premises. Certainly employees have ample opportunity to discuss unions or exercise their self-organizational rights on and off Respondent's premises. They have ample opportunity to solicit membership off Respondent's premises and on Respondent's premises during all times except during those times when employees are actually supposed to be working on their jobs. This includes periods when they are in the smoking areas, the rest rooms, and eating their lunches, while they are being paid by Respondent, and their pre- and post-shift time.

The statements or remarks by supervisors complained of by the Board herein do not diminish or deprive the

employees of their right to carry on legitimate activities or of the full accommodation of self-organizational rights to which they are entitled even though a rule against solicitation during the work time is enforced.

The Petitioner in its brief contends that Respondent's property and managerial rights, which include its right to require its employees to refrain from solicitation or other outside activity during the periods they are supposed to be at work, are rights which it, and other employers, have only by sufferance of the Board and that they are subject to such limitations as the Board may in its discretion impose. The Board at Page 15 of its brief sets forth this contention as follows:

> "In short, the Board making an adjustment between the competing interests and rights, **permits an employer** to limit the Section 7 right of the employees to engage in solicitation where the abridgement . . . is solely for the purpose of assuring the employer of the employees' full attention to work during working hours."

Neither Section 7 nor any other provision of the Act gives or implies that the Board shall have such complete control over an employer's business; nor may the Board give self organization rights under the act such paramount status over property and all other rights.[8]

Nevertheless under the Petitioner's concept here, unless the employer satisfies the Board that it is prohibiting employees from engaging in solicitation when they are

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[8] "It is sufficient for this case to observe that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task."

(*Southern S. S. Co. v. NLRB*, 316 U. S. 31, 47, 62 S. Ct. 886, 894.)

being paid to be at work and are supposed to be at work, **solely** because of its concern for "undisturbed production," then the employer may not restrict solicitation by his employees on his premises even during the time that they are required by the nature of their jobs and the duties thereof to attend to their jobs.[9]

In the instant situation Respondent made clear to the two employees in question, and others, that they would be subject to discipline or discharge if they **in the future** utilized time when they were supposed to be working, or interfered with others who were at work, in order to engage in solicitation in the plants. The evidence is clear that such activity was being carried on in the plants at that time. Respondent in the exercise of its business judgment had a right to stop it if it felt that it did, or was likely to, interfere in any way with production, efficiency, or discipline. In the two discharges here involved, **after** the employees had been expressly warned to discontinue such activity in the future, they disregarded the warnings, engaged in solicitation of other persons during their own and the other persons' work time in defiance of Respondent's directions. These discharges for disregard of instructions and violation of a rule limiting their work time activity, we submit, were not illegal interference by Respondent with their right of self-organization nor did they impinge upon reasonable "minimum" accommodation of self-organizational rights to property and managerial rights.

We submit further that this is not a matter which the Board may evaluate from the standpoint of whether or not in **its** judgment the Respondent presented proof of the extent to which production was interfered with which

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[9] "The employer in his right of control over the property and employees is authorized to make reasonable rules for the conduct of the business and the employee is bound to obey such reasonable rules as part of his contract of hire."

(*Midland Steel v. NLRB*, 113 F. 2d 805, 806, 6th Cir.)

the Board regarded as sufficient to warrant its permitting Respondent to continue to exercise its inherent right to control its property and control the work time of its employees.[10]

Independently of its no-solicitation rule, we submit, Respondent had a legal right to direct the two employees here involved, and all other employees, not to leave their work for, or engage in, solicitation when they were supposed to be at work. It had a further right to discipline or discharge for disobedience of that instruction, which was clearly insubordination, as it did with the employees here involved, without being subject to an order directing reinstatement and back pay to them for so doing. This was the purpose enunciated by Congress in enacting the amendments to Section 10 (c) of the Act as part of the amendments embodied in the Taft-Hartley Act. See report of the Committee of Conference, Labor-Management Relations Act of 1947, H. Rept. No. 510, 80th Congress, First Session, June 3, 1947.[11] This Court has enunciated

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[10] ". . . Motives are notoriously susceptible of being misunderstood and hard to prove or to disprove. If an ordinary act of business management can be set aside by the Board as being improperly motivated, then, indeed, our system of free enterprise, the only system under which either labor or management would have any rights, is on its way out, unless the Board's action is scrupulously restricted to cases where its findings are supported by substantial evidence, that is, evidence possessed of genuine substance . . ."

(*N.L.R.B. v. Houston Chronicle Publishing Co.*, 211 F. 2d 848, 5th Cir.)

". . . as we have so often said, management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8 (a) (3) forbids . . ."

(*N.L.R.B. v. McGahey*, 233 F. 2d 406, 412, 414, 5th Cir.)

[11] ". . . The House bill also included, in section 10 (c) of the amended act, a provision forbidding the Board to order reinstate-

the principle that "insubordination, disobedience or disloyalty is adequate cause for discharge." (NLRB v. Local Union 1229, IBEW, 346 U. S. 464, 474-5, 98 L. ed. 195, 203-4.)[12]

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ment or back pay for any employee who had been suspended or discharged, unless the weight of the evidence showed that the employee was not suspended or discharged for cause. The Senate amendment contained no corresponding provision. The conference agreement omits the 'weight of evidence' language, since the Board, under the general provisions of section 10, must act on a preponderance of evidence, and simply provides that no order of the Board shall require reinstatement or back pay for any individual who was suspended or discharged for cause. *Thus employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for* Communist activities, or for other causes (see Wyman-Gordon v. NLRB, 153 F. 2d 480), will not be entitled to reinstatement."

(U. S. Code Congr. Service, 1947, First Session, Page 1161.)
(Emphasis supplied.)

[12] See also to like effect: *NLRB v. American Thread Co.*, 210 F. 2d 381, 5th Cir.; *NLRB v. Fulton Bag & Cotton Mills*, 175 F. 2d 675, 5th Cir.; *NLRB v. Goodyear Tire & Rubber Co.*, 129 F. 2d 661, 5th Cir.; *Stonewall Cotton Mills v. NLRB*, 129 F. 2d 629, 5th Cir.; *NLRB v. Robbins Tire & Rubber Co.*, 161 F. 2d 798, 5th Cir.; *NLRB v. Caroline Mills*, 5th Cir., 167 F. 2d 212; *NLRB v. Reynolds Corp.*, 168 F. 2d 877, 5th Cir.; *NLRB v. Ray Smith Transport Co.*, 193 F. 2d 142, 5th Cir.; *NLRB v. Thompson Products, Inc.*, 97 F. 2d 13, 6th Cir.; *NLRB v. Empire Furniture Co.*, 107 F. 2d 95, 6th Cir.; *NLRB v. Goshen Rubber & Mfg. Co.*, 110 F. 2d 432, 7th Cir.; *Kansas City Power & Light Co. v. NLRB*, 111 F. 2d 340, 8th Cir.; *Subin v. NLRB*, 112 F. 2d 326, 3d Cir.; *NLRB v. Martel Mills*, 114 F. 2d 624, 4th Cir.; *NLRB v. Wilson & Co.*, 123 F. 2d 411, 8th Cir.; *Dannen Grain & Milling Co. v. NLRB*, 130 F. 2d 321, 8th Cir.; *Interlake Iron Co. v. NLRB*, 131 F. 2d 129, 7th Cir.; *NLRB v. Citizens News Co.*, 134 F. 2d 970, 9th Cir.; *NLRB v. J. L. Brandeis & Sons*, 145 F. 2d 456, 8th Cir.; *Wyman & Gordon v. NLRB*, 153 F. 2d 480, 7th Cir.; *NLRB v. Kopman-Woraseck Shoe Mfg. Co.*, 158 F. 2d 103, 8th Cir.; *NLRB v. Reynolds International Pen Co.*, 162 F. 2d 680, 7th Cir.; *NLRB v. People's Motor Express, Inc.*, 165 F. 2d 977, 4th Cir.; *NLRB v. Mylan Sparta Co.*, 166 F. 2d 485, 6th Cir.; *NLRB v. Enid Co-op Association*, 169 F. 2d 986, 10th Cir.; *NLRB v. West Ohio Gas Co.*, 172 F. 2d 685, 6th Cir; *Albrecht v. NLRB*, 180 F. 2d 652, 7th Cir.; *NLRB v. Tennessee Coach Co.*, 191 F. 2d 456, 6th Cir.; *Indiana Metal Products Co. v. NLRB*,

For the foregoing reasons and particularly in the light of the provisions of Section 10 (c) of the Act as it has been interpreted by this Court and the Courts of Appeal, the decision of the Court below insofar as it found that neither Rich nor Parker was discriminatorily discharged by Respondent must be sustained independently of whether or not the Petitioner prevails in the **Nutone** case (supra).

C. The Act Prescribes and the Court Below Has Decreed the Traditional Specific Remedies for the Correction of the Unfair Labor Practices Found to Have Been Committed by Respondent. In Addition to These Adequate Remedies, the Board Seeks to Impose Additional Requirements Upon Respondent Which Are Punitive in Nature and Not Remedial and Which Result in a Forfeiture of Inherent Rights of Respondent. Such Punitive Remedies Are Beyond the Scope, Power, and Authority Vested in the Board by the Act.

The Act, the Board's Order, and the Decision of the Court below prescribed specific remedies which clearly correct any violation of Section 8 (a) (1) of the Act which may have been committed by Respondent's Supervisors as a result of their interrogating employees or making other statements found to be threatening or coercive. The Board's Order and the Decision of the Court below prohibit any such future conduct by requiring the Respondent, under the penalty of contempt, to cease and desist from such activities. The Decision of the Court below, moreover, directs that one employee who was discharged be reinstated with back pay because, upon consideration of all the evidence in the Record, the Court below determined that substantial evidence supported the Board's Finding that as to him the no-solicitation rule was discriminatorily applied. These remedies are in keeping with

202 F. 2d 613, 7th Cir.; *NLRB v. Clearwater Finishing Co.*, 203 F. 2d 938, 4th Cir.; *NLRB v. Wayside Press*, 206 F. 2d 862, 866, 9th Cir.

those traditionally followed by the Board and universally upheld by the Courts, and by inference, at least, approved by Congress in the enactment of the 1947 Amendments to the Act.[13]

Thus the Board's Order as enforced by the Court imposes the traditional remedies which rectify the unfair labor practices found and prohibit their future commission. What the Petitioner now seeks further is that the Respondent be subjected to an additional punitive order which would deprive it of its right to require its employees to devote their work time to their jobs and not to utilize such work time to engage in outside activities without permission if Respondent's supervisory employees discuss unions or make anti-union comments on Respondent's premises during the non-supervisory employees' working hours.

The rationalization upon which the Board relies in seeking this either ignores or deliberately evades the inevitable and apparent differences between the status and function of supervisory and non-supervisory employees. Clearly, industrial practice establishes that there is a substantial difference in the situation where non-supervisory employees desert their posts at will and leave the jobs which they are running, or are supposed to be running, to engage in solicitation, conversations, or activities extraneous to those jobs, and the situation involved when supervisory employees go to the work places of their subordinates while they are at work. The jobs of Respondent's Supervisors require them to move about, make themselves aware of the condition of their subordinate employees' jobs in their departments, instruct them, to communicate orders, directions, and information, and discuss theirs and the Company's production problems with them. It is the duty

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[13] *NLRB v. Gullett Gin Co.*, 340 U. S. 361, 365, 366, 95 L. ed. 338, 341, 342; *NLRB v. Seven-Up Bottling Co.*, 340 U. S. 344, 351, 97 L. ed. 377, 384.

of the non-supervisory employees to stay on their jobs and run them when they are supposed to be run. A non-supervisory employee violates that duty when he leaves his job without permission. Petitioner's contention here, if sustained by this Court, would give Respondent's non-supervisory employees carte blanche authority to leave their jobs even when they needed attention or required their presence, or to interfere with other employees who were at work, whenever they pleased. We submit that the Employer through its Supervisors has the right to permit, or refuse to permit, non-supervisory employees to leave their jobs in order to solicit or to carry on other non-work activities. If the Employer does not grant such permission or prohibits the activity during work time, we submit that the Board does not have the authority, statutory or otherwise, to direct or require the Employer to sanction or permit such activity during work time.

Supervisors normally go to the jobs of employees while at work. They engage in conversations with employees and, as a matter of fact, they cannot effectively perform their job of supervision unless they do so. As representatives of management and as part of their supervisory jobs, Supervisors in Respondent's plant have a right, and at times a duty, to talk to employees on their jobs. Supervisors are Respondent's principal channel of communication with its employees. Such right and duty of Supervisors does not give non-supervisory employees a concomitant right to leave their jobs and attend to matters not related to the job, without permission, much less when expressly forbidden.

Assuming that Supervisors may seek at times to persuade employees that unionization is not preferable or desirable from the Employer's standpoint, that is nevertheless a matter which they, as part of management, have a right to do even during work time, which is unmistakably "management's time," as contrasted with non-work time, which

is an employee's "own time." If, in so doing, Supervisors exceed the limits of the Act, the Act provides an effective remedy for the rectification of such situations. Such remedies have been invoked by the Board and enforced by the Courts.

The Decree of the Court below contains a specific prohibition against Respondent's Supervisors' engaging in illegal interrogation, making coercive or threatening remarks to employees or soliciting employees to withdraw from the Union, and directs the reinstatement with back pay of an employee found to have been discriminatorily discharged. These are the normal remedies for violations of Sections 8 (a) (1) and 8 (a) (3) when the Findings as to them are supported by substantial evidence in the Record. These are the sole remedies warranted in the instant matter. The additional remedies sought by the Board in this Court, and denied to it by the Court below, would be a mandate to Respondent that it may not prevent or interfere with its non-supervisory employees' utilizing its premises, its paid time, and their work time to carry on any activities they chose in the furtherance of "self-organizational" rights at any time they chose, so long as the Employer permitted its Supervisors to use its premises and its work time in order to communicate its views to its employees. Such additional remedies would thus result in a forfeiture of Respondent's normal rights in respect to its property, disciple, efficiency, and production,[14] and would as a consequence be punitive, not remedial.

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[14] ". . . That the altercation may have arisen because of Timmerman's advocacy of the union does not sustain the position of the Board, since the employer was within its rights in forbidding union advocacy during working hours . . ."

(*NLRB v. Clearwater Finishing Co.*, 216 F. 2d 668, 4th Cir.)

". . . Under the statute and under the adjudicated cases enforcement of this order must be denied. To decide that a no-solicitation rule deprives the employer of the right to confer with his employees about any important matter, including unionization, is to deprive him of the freedom of speech specifically guaranteed by the Constitution and by Section 8 (c) of the Act. The Board

This Court has rejected the concept that Respondent may be required to make its premises available to the Union for its use as a penalty for its having discriminated against employees in the exercise of their rights under the Act. See in this connection **NLRB v. Stowe Spinning Company**, where the Court said:

> ". . . If the Act permitted imposing such a penalty upon the employers, it would perhaps be appropriate to compel them to provide a meeting hall in lieu of those it kept the Union from obtaining. However, it is well established by decision of this Court that Sec. 10 (c) of the Act, 29 U. S. C. A., Sec. 160, 9 F. A. C., Title 29, Section 160, is remedial, not punitive. **Consolidated Edison Co. v. NLRB**, 305 U. S. 197, 83 L. ed. 126, 59 S. Ct. 206; **Republic Steel Corp. v. NLRB**, 311 U. S. 7, 85 L. ed. 6, 61 S. Ct. 77. In both cases, Chief Justice Hughes said for the Court 'this authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board be of the opinion that the policies of the Act might be effectuated by such an order . . .'"
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> (**NLRB v. Stowe Spinning Co.**, 336 U. S. 226, 236, 93 L. ed. 638, 646.)

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is not authorized to write into the Act a limitation that does not exist.

"The Board contends finally that its ruling must be upheld because of the 'economic power' of the employer and also because the plant or shop is a convenient place for the union to canvass for members. If this rule is to stand it will be applied to employers of very small resources as well as to the far-flung Woolworth Company. Freedom of speech is guaranteed under the Constitution alike to the weak and the powerful. The Board is not authorized by construction and implication to limit the freedom of speech established in the Constitution and re-emphasized in Section 8 (c) . . ."

(*NLRB v. F. W. Woolworth Co.*, 214 F. 2d 78, 81, 82, 83, (6th Cir.)

This Court has moreover held:

> ". . . We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures and thus prescribe penalties or fines which the Board may think would effectuate the purposes of the Act. We have said that this 'authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices even though the Board be of the opinion that the policies of the Act might be effectuated by such an order' . . . the power to command affirmative action is remedial, not punitive . . ."
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> (**Consolidated Edison Co. v. NLRB**, 305 U. S. 197, 235-236, 83 L. ed. 126, 143-144.)

See also: **NLRB v. Pennsylvania Greyhound Lines**, 303 U. S. 261, 267-268, 82 L. ed. 831, 835-856.

CONCLUSION.

For the reasons stated above, it is respectfully submitted that the Decision of the Court of Appeals below should be affirmed.

Respectfully submitted,
AVONDALE MILLS,

By: .....
Of Counsel.

FRANK A. CONSTANGY,
M. A. PROWELL,
FRED W. ELARBEE, JR.,
MILDRED McCLELLAND,
1404 Candler Building,
Atlanta 3, Georgia,
Attorneys for Respondent.

APPENDIX.

Statutes Involved.

Labor Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C., Sec. 141 et seq., Sec. 10.

"(c) The testimony taken by such member, agent or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: **Provided**, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: **And provided further**, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization, national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said com-

plaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree

enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).